In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1242

BRUCE CASE,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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March, 1977

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TO: *The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States*

BRUCE CASE, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Oklahoma entered in this proceeding on the 12th day of October, 1976.

OPINION BELOW

The opinion of the Court of Criminal Appeals of the State of Oklahoma is reported at *Case* v. *State*, 555 P.2d 619 (Okl. Cr. 1976), and is printed in the Appendix hereto. The mandate of the Court of Criminal Appeals of the State of Oklahoma is printed in Appendix A hereto. The Judgment and Sentence on Conviction of the District Court of Alfalfa County, Oklahoma, is printed in Appendix A hereto.

JURISDICTION

The judgment of the Court of Criminal Appeals of the State of Oklahoma (see Appendix A) was entered on the 12th day of October, 1976. A timely petition for rehearing was denied on the 4th day of November, 1976, and is printed in Appendix A hereto. Associate Justice Byron R. White on the 28th day of January, 1977, upon the application of the Petitioner, extended the time within which this petition could be filed to and including the 7th day of March, 1977. The jurisdiction of the Supreme Court is invoked under the provisions of 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether after retrial and conviction on an arson charge in a State trial court in a sparsely populated rural county, following reversal of a conviction which resulted only in a jury-imposed fine, due process of law prohibits the imposition by the second jury of a five-year sentence where the trial judge refused to allow the accused to waive the determination of sentence by the jury and where six members of the jury admitted reading about the case in the newspaper, where the charge against the accused was the first of its nature filed in the county in five years, and where between reversal of the first conviction and retrial, a period of only eight months, four arson charges were filed in the county.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Alfalfa County, whose population is "approximately 7,000 to 8,000," is located in rural northwest Oklahoma. (Trial transcript, hereinafter abbreviated T., page 13). On June 28, 1972, the Southgate Laundry in Cherokee, Oklahoma—the County Seat of Alfalfa County—was severely damaged by fire. Subsequently, the first arson case filed in the county in five years was filed against the Petitioner.

In early 1973, the Petitioner was tried and convicted by a jury of the offense of Arson in the Second Degree in Alfalfa County District Court Case No. CRF 72-11. A conviction for second degree arson in the State of Oklahoma subjects a defendant to the possibility of imprisonment in the penitentiary for a term of up to fifteen years and/or a fine not to exceed $20,000.00. 21 Okl. Stat. § 1402. The verdict of the jury imposed a fine against the Petitioner in the

amount of $12,000.00. Judgment and sentence were rendered against the Petitioner by the court in accordance with the verdict of the jury on March 6, 1973. In due course, Petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals, No. F 73 303, who reversed and remanded for a new trial on the basis that certain evidence admitted at trial over the objection of the Petitioner should have been suppressed. The opinion of the Court of Criminal Appeals of the State of Oklahoma was filed on February 13, 1974, and the mandate was issued on March 1, 1974. The Alfalfa County newspaper, *The Cherokee Messenger*, published a front page story concerning the reversal of the Petitioner's conviction and the reason therefor on February 26, 1974.

Between the date on which the Oklahoma Court of Criminal Appeals reversed the Petitioner's first conviction and the date of the Petitioner's retrial on October 21, 1974, four buildings in Cherokee were severely damaged by fire. The fires occurred on July 12, July 15, July 20, and July 30 of 1974 and each was publicized in the local newspaper, *The Cherokee Messenger*. Subsequently, H. R. Smith was charged in the District Court of Alfalfa County with four separate offenses of arson in connection with the four fires in Alfalfa County District Court cases CRF 74-18, CRF 74-19, CRF 74-20 and CRF 74-21. At the time of the Petitioner's retrial on the 21st day of October, 1974, H. R. Smith had not stood trial on any of the four arson charges filed against him.

On October 21, 1974, the Petitioner was retried for the offense of Arson in the Second Degree. Prior to the voir dire

of the prospective jurors, defense counsel for the Petitioner argued to the trial court a motion for individual voir dire on the grounds that the notoriety of the first trial and appeal had been accomplished by word of mouth throughout the community and that between the first trial and the second, at least four arsons had occurred in Alfalfa County (T. 8-10). The trial judge recognized the grounds as valid and said he would allow defense counsel some latitude on voir dire, *i.e.*, at the end of the voir dire the judge agreed to allow defense counsel to examine certain jurors apart from the panel. During voir dire, twenty-four prospective jurors were called and examined and twelve jurors and one alternate were ultimately seated. Seven jurors were excused for cause, six of the seven because they were acquainted with the Petitioner and because they admitted that the relationship might affect their decision. Six of the twelve jurors ultimately seated admittedly had read something about the case in the newspaper and six of the twelve knew the Petitioner at least on sight.

After the evidence was presented and prior to the submission of the cause to the jury, defense counsel specifically objected to the determination of sentence by the jury in the event that it found the Petitioner guilty (T. 259). This objection was overruled by the trial judge and the case was submitted to the jury who found the Petitioner guilty of the offense charged and who imposed no fine but a term of five years to serve in the State penitentiary. Thereafter, the Petitioner again appealed his conviction to the Oklahoma Court of Criminal Appeals, No. F 74 258. Two of the Petitioner's contentions on appeal were that (1) it was error to deny the Defendant's waiver of the right to have

the jury set the punishment and (2) rendition of sentence at the second trial greater than at the first trial was reversible error in that it constituted a violation of due process of law. The Oklahoma Court of Criminal Appeals rejected both of these contentions. In regard to the issue of the waiver of a jury determination of sentence, the Oklahoma Court of Criminal Appeals relied on its holding in *Reddell* v. *State*, 543 P.2d 574 (Okl. Cr. 1975), to the effect that it was not error for the trial court to deny defendant's request to have the trial court set the punishment in the second stage of the statutorily required bifurcated proceedings under Oklahoma's habitual offender legislation, 22 Okl. Stat. § 860. The court expressly held that a "defendant may not unilaterally waive the assessment of punishment by a jury which is able to agree." *Case* v. *State*, 555 P.2d 619, 625 (Okl. Cr. 1976). The Oklahoma Court of Criminal Appeals, in rejecting the Petitioner's contention that rendition of sentence at the second trial greater than that at the first was reversible error as constituting a violation of due process of law, summarily concluded that there was no evidence of vindictiveness in the record. In this regard, the Oklahoma Court of Criminal Appeals observed that "the trial judge allowed the defendant latitude in his voir dire of prospective jurors and all parties were admonished from mentioning four subsequent arsons committed in the vicinity." *Case* v. *State*, supra, at 625.

REASONS FOR GRANTING THE WRIT

In *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), this Court held that in order to insure the absence of vindictiveness against an accused who successfully challenged a prior conviction, due process of law demands that upon retrial of the cause the sentencing judge, if he imposes a more severe sentence than that received at the first trial to the Court, must affirmatively state in the record his reasons for so doing. And, these reasons "must be based upon objective information concerning identifiable conduct on the part of the Defendant occurring after the time of the original sentencing proceeding." *North Carolina* v. *Pearce*, supra, at 23 L.Ed.2d 670. The rationale in *Pearce* was that since the fear of vindictiveness at retrial might unconstitutionally deter a defendant's challenge of his conviction, due process requires that a defendant be freed of fear of such a retaliatory motivation on the part of the sentencing judge.

Subsequently, in *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed2d 714 (1973), this Court addressed itself to whether the *Pearce* restriction ought to apply to jury sentencing as well. It was stated by the Court that a potential for abuse by the jury of the sentencing process is *de minimis* in a properly controlled retrial. In this regard, this Court emphasized that the knoweldge of the jury of the prior sentence was essential to a claim that the harsher second sentence was in retaliation for the successful appeal; this claim was conspicuously absent in *Chaffin* where the parties agreed that the second jury was unaware of the length of the sentence imposed by the first. In *Chaffin* this

Court delineated two factors which distinguish jury and judge sentencing and which further diminish the possibility of impropriety in jury sentencing. First, unlike the judge who has been reversed on appeal, this Court felt that a jury will have "no personal stake in the prior conviction and no motivation to engage in self-vindication." *Chaffin* v. *Stynchcombe*, supra, at 36 L.Ed.2d 724. Secondly, this Court felt that the jury would not likely be sensitive to the interests that might cause trial judges to impose higher sentences in order to discourage meritless appeals. In light of these factors and where information regarding the prior sentences is withheld from the jury, this Court held that there is no basis for holding that jury resentencing poses any real threat of vindictiveness.

Here, the circumstances surrounding the imposition of a more severe sentence at the second trial than at the first are markedly different than in *Chaffin*. In this case, the arson charge filed against the Petitioner was the first such charge filed in over five years in sparsely-populated, rural Alfalfa County [The 1972 World Almanac recites that the population of Alfalfa County was 7,224 and that the county consists of 868 square miles.]. When the Petitioner was convicted the first time, he was not sentenced to serve any time in the penitentiary but was ordered to pay a $12,000.00 fine. He appealed, and the reversal of his conviction and the reasons therefor were publicized in the local newspaper, *The Cherokee Messenger*, within two weeks after the opinion was rendered by the Court of Criminal Appeals of the State of Oklahoma. Between the date of the decision of the Court of Criminal Appeals reversing the Petitioner's first conviction and the date of his retrial, four buildings in the

town of Cherokee—the County Seat of Alfalfa County and the situs of the fire forming the basis of the Petitioner's arson charge—were severely damaged by fire. As of the date of the Petitioner's retrial, the person accused of arson in connection with the four fires had not yet stood trial on any of the charges. At retrial the Petitioner was again convicted but on this occasion, the jury, six of whose members admitted on voir dire to having read about the case in the newspaper, sentenced him, not to a fine, but to serve a term of five years in the State penitentiary.

In *Chaffin*, this Court reaffirmed the rationale of *Pearce*, *i.e.*, that "vindictiveness against the accused for having successfully overturned his conviction has no place in the resentencing process, whether by judge or jury." *Chaffin* v. *Stynchcombe*, supra, at 36 L.Ed.2d 718. However, as was observed by this Court in *Pearce*, "(t)he existence of a retaliatory motive would, of course, be extremely difficult to prove in any case." *North Carolina* v. *Pearce*, supra, at 23 L.Ed 2d 669. Yet, unlike in *Chaffin*, in the instant case the circumstances from which vindictiveness might be inferred are readily apparent. First, unlike in *Chaffin*, not only is it possible, it is indeed likely that certain jury members knew of the terms of the prior sentence. In a county of approximately 7,000 to 8,000 people, it is likely that the Defendant's first conviction and sentence were discussed in local cafes and on street corners for weeks following his first conviction. Likewise, the reversal of his conviction and the reasons therefor. The closeness of the community is demonstrated by the fact that of the twenty-four jurors called and examined on voir dire at the second trial, of the seven excused for the cause, six of those were excused

because they were acquainted with the Petitioner and because they admitted that the relationship might affect their decision. Furthermore, at least six of the twelve jurors ultimately seated admittedly had read something about the case in the newspaper and six of the twelve knew the Petitioner at least on sight. Furthermore, it can hardly be doubted that a series of four severe fires in the period between the reversal of the Petitioner's conviction and his retrial, when the District Court's records reflect that there had been only two other arson charges filed in the county within ten years (one of which was that charging the Petitioner), could not do anything but instill fear in the hearts of the citizens of the community concerning the type of crime for which the Petitioner was charged. Thus, perhaps unlike the usual case, the jurors at the Defendant's retrial did have a "personal stake in the prior conviction" and a "motive to engage in self-vindication"—retribution for their fear of the crime. Surely the Petitioner, by appealing his prior conviction, cannot be required to risk that he may be subjected to the wrath of a jury who because of events occurring subsequent to his first trial have an intensified fear of the type of crime for which he is charged.

But, the dilemma of the Petitioner does not end here. The final argument of the Petitioner in *Chaffin* was that harsher sentences on retrial by jury are impermissible even in the absence of vindictiveness because they have a chilling effect on a convicted defendant's right to challenge his conviction. This Court rejected this contention stating that an incidental consequence of unrestricted jury sentencing is that it may require the accused to choose whether to accept the risk of a more severe sentence or to waive his

rights. In so holding, the Court observed that the likelihood of receiving a more severe sentence is remote when a convicted defendant considers an appeal, partially because he has the opportunity upon retrial to select trial by judge, with the *Pearce* restrictions, or trial by jury. At this point, this Court noted that unrestricted jury resentencing would not have an impermissible chilling effect on the right of one, who has successfully challenged a prior conviction, to select a jury trial upon retrial, because previous decisions of the Court hold that the Constitution does not always forbid requiring one to make choices, *i.e.*, to choose judge sentencing restricted by *Pearce* or jury sentencing restricted only by vindictiveness. In this case, however, the Petitioner was denied the choice. He attempted to waive jury sentencing and thus to avail himself of the *Pearce* restriction which would insure that he would serve no time unless he had by his own conduct since the prior trial justified the imposition of a jail sentence. But, the trial court denied him the right to waive jury sentencing and the Court of Criminal Appeals affirmed the trial court, holding that the Petitioner had no such right. Thus, it appears that, contrary to this Court's holdings in *Pearce* and *Chaffin*, an individual in Oklahoma who successfully challenges a conviction may be compelled at retrial to be sentenced by a jury of his peers, who, regardless of what has happened in the community since the first conviction and regardless of their knowledge of the prior case, its reversal, and the reasons therefor, have unrestricted license to impose a more severe penalty.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted to review the decision of the Court of Criminal Appeals of the State of Oklahoma.

Respectfully submitted,

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March, 1977

CERTIFICATE OF SERVICE

I, Stephen Jones, a member of the Bar of the Supreme Court of the United States and counsel of record for Bruce Case, Petitioner herein, hereby certify that on the ..... day of ....., 1977, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals on each of the parties herein, as follows:

On the State of Oklahoma, Respondent herein, by depositing such copies in the United States Post Office, in Oklahoma City, Oklahoma, with first class postage prepaid, properly addressed to the post office address of Larry Derryberry, Attorney General of the State of Oklahoma, the above-named Respondent's counsel of record, at the State Capitol in Oklahoma City, Oklahoma.

All parties required to be served have been served.
DATED this ..... day of ....., 1977.

Stephen Jones
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Attorneys for Petitioner

APPENDIX

IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

BRUCE CASE, Appellant,
-vs-
THE STATE OF OKLAHOMA, Appellee.

No. F-75-258

-OPINION-

BLISS, Judge:

The Appellant, Bruce Case, hereinafter referred to as defendant, was charged, tried before a jury and convicted in the District Court of Alfalfa County, Case No. CRF-72-11, of the crime of Arson in the Second Degree in violation of 21 O.S. (1971), §1402. Punishment was assessed at a fine of Twelve Thousand Dollars ($12,000.00) and a timely appeal was perfected to this Court. In *Case* v. *State*, Okl. Cr., 519 P.2d 523 (1974) this Court reversed the conviction and remanded the cause for new trial.

At the second trial the jury again found the defendant guilty and punishment was assessed at a term of five (5) years in the custody and control of the Department of Corrections of the State of Oklahoma. From a judgment and sentence in conformance with the verdict the defendant has perfected his timely appeal of said second conviction.

As stated in Case, supra, the defendant was the manager of an automatic laundry located in Cherokee, Alfalfa County, Oklahoma. Fire broke out in the laundry at approximately 4:00 a.m. on June 28, 1972. The subsequent investigation revealed that within the laundry there had been installed an "elaborate apparatus reminiscent of a Rube Goldberg contraption." At 4:00 a.m. a timing device closed the contacts between wires attached to a 12 volt battery thereby setting off a chain reaction which resulted in the fire. Cardboard tubing made of boxes had been connected to a garden hose which in turn was connected to a natural gas line. According to the expert testimony of Julian Pierce, agent for the State Fire Marshal's Office, had the apparatus worked as designed the natural gas explosion would have demolished the building.

According to witnesses, the apparatus could have been installed only between the time the laundry closed, at approximately 11:00 p.m. on the 27th and 4:00 a.m. on the 28th when the timing device caused the electrical contact. Numerous witnesses testified that prior to the fire the defendant had purchased electrical wire, had been looking for cardboard boxes, was in the market for a used battery, and had access to a model-T coil similar to the one used in the "contraption." It was further established that an air conditioning vent in the laundry had been taped shut prior to the fire and that the defendant had purchased masking tape shortly before the fire. A finger print expert testified that he found finger prints on two sections of the cardboard tubing matching known prints of the defendant.

Delbert Dixon testified that he had been working at the laundry for two or three weeks prior to the fire, his job being to close the laundry so that the defendant could do his farming at night without having to come back to town. On the 27th Dixon met the defendant and he told Dixon to close that evening because he hadn't finished his farm work. Dixon closed at approximately 11:00 p.m. and testified that he did not notice any model-T coils, cardboard

boxes or rubber hoses, although he did seem to recall a battery had been on the work bench for a few days. No wires connected the battery to the timer. Kenneth Williams, the manager of a filling station in Cherokee, testified that he closed his station at approximately 12:30 a.m. on the 28th and noticed that the night light at the laundry was out when normally it would have been on. Williams returned to his station at approximately 1:30 a.m. and saw a pickup pull into a lot approximately 200 to 300 feet from the laundry. He could not describe the pickup because it was dark but was reasonably sure it was dark colored. He further described the defendant's pickup as being light red and white and stated that he was not testifying that the pickup was or was not the defendant's since he was not paying much attention and it was dark.

Alfalfa County Sheriff Delmar Coppock testified that during the course of his investigation he discovered some tire tracks located south of the laundry on the lot described by Williams. A picture was taken of the tire tracks and they matched the tires on the defendant's pickup. However, the tracks had no unique features and the tires on the defendant's truck were a standard make.

For the defense Clarence A. Bassett testified that in the latter part of October, 1972, he purchased some real estate from the defendant and received approximately one-half mile of electric fence, a battery and a battery charger.

The defendant then testified in his own behalf stating that the laundry was owned by his brother and that the defendant had no financial interest in it. He further stated that he did his farming at night and hired Dixon to close up around 11:00 p.m. so he wouldn't have to come back into town. He further stated that he had been looking for boxes to use in the laundry but that softdrink boxes similar to those used in the apparatus were of no use to him since they were not deep enough. He further stated that he had purchased tape to tape up packages and to make "out of

order signs" and that he purchased wire for his farming operations. He further admitted having a model-T, but stated that the only coils were in the vehicle. On the evening in question he met Dixon and told him to close up since he would be farming. The defendant worked on his farm that night, finishing at approximately 5:45 a.m. He then came into town to open up the laundry and discovered that there had been a fire. He further denied having anything to do with the fire or the construction of the apparatus and that he had no grudge against his brother. The defense then rested.

The defendant's first assignment of error contends that the trial court committed reversible error by denying defendant's motion for production of certain items which the defendant believed exculpatory in nature. In particular the defense sought the prosecutor's files concerning four arson charges filed against a Mr. Smith for the reason that Smith had been charged with burning a number of buildings in the Cherokee area said fires involving commercial buildings and having occurred at night.

The record reveals that the trial court considered the motion and that the charges filed against Mr. Smith resulted from fires that occurred at least two years after the laundry fire. The trial court then overruled the motion.

In *State, ex rel. Sadler* v. *Lackey*, Okl., 319 P.2d 610, this Court held that the defendant has no absolute right of pre-trial inspection or to compel the state to produce documents and reports that may be beneficial to the defense. However, in the interest of justice and for good cause shown, where the denial of pre-trial inspection might result in a miscarriage of justice the trial court has the inherent right in the exercise of sound judicial discretion to grant the remedy of pre-trial inspection. In the instant case it is apparent that the trial court did not abuse its discretion in denying the defendant's request to inspect the Smith files, since the instant case resulted from a fire occurring

at least two years prior to the fires alleged to have occurred at the hand of Smith. The defendant's first assignment is without merit.

The defendant next urges that the trial court committed reversible error in sustaining the state's motion in limine concerning making references to subsequent arson charges filed against Smith in Alfalfa County.

After a reading of the transcript of the hearing on said motion it becomes evident that the state's motion was to require all participants in the trial and their attorneys to refrain from mentioning either in opening statements, closing argument or during the trial the fact that Smith had been charged in four arson cases resulting from fires set in the summer of 1974, unless there was any direct evidence linking Smith with the laundry fire. The evidence presented at the hearing reveals that Smith was charged with four fires that occurred within a short span of time during the summer of 1974, that Smith himself had reported each fire and that no timing device or incendiary device was used. The trial court in ruling on the motion stated as follows, to-wit:

> "THE COURT: I will follow the law, Mr. Jones, it says that it is competent for you to show by any legal evidence that another person committed the crime, but before such testimony can be received there must be proof that some overt act or some connection with it, such train of fact or circumstances that tend to clearly to point out such other person is the guilty party."

In *Quinn* v. *State*, 55 Okl. Cr. 116, 25 P.2d 711 this Court held that evidence offered to show that some other person committed the crime charged must connect such other person with the fact; that is, some overt act on the

part of another towards the commission of the crime itself. There must be evidence of acts or circumstances that tend clearly to point to another, rather than to the accused, as the party guilty of the crime charged. Therefore, in the instant case, it is our opinion that the trial court did not abuse its judicial discretion in ruling on the motion in limine as set out above. The defendant's second assignment is without merit.

The defendant's third assignment of error urges that the trial court erred in denying the defendant's motion to strike the testimony of Sheriff Coppock concerning the comparison of the defendant's tires and certain tire tracks found on an adjacent lot for the reason that they were not distinctive enough to afford a reliable comparison. In support of his contention the defendant argues that the tracks found were the tracks of a type of tire mass produced and found on many pickups and that there were no distinguishing peculiarities, such as cuts. Therefore the evidence presented was unreliable. The record reveals that Sheriff Coppock testified that he found tire tracks some two or three hundred feet away from the laundry on the lot described by Williams, that he photographed the tracks himself with a Polaroid camera and that the tracks were similar to tires found on the defendant's pickup. On cross-examination the sheriff admitted that there was no unique tear or jagged edge which was unique to one of the defendant's tires, that the defendant's tires were a standard make, that any other tire from the same mold would have made the same impression, and that he was not stating that the track was in fact made by the defendant's tire.

In *Allcorn* v. *State*, Okl.Cr., 392 P.2d 66, this Court citing *Courtright* v. *State*, 79 Okl.Cr. 270, 154 P.2d 588, held that evidence of tracks are admissable in criminal cases. The weight and credibility to be given to such testimony is a question for the jury alone to determine after taking into consideration all facts and circumstances surrounding the

particular case. A witness may not testify to conclusions but may testify to facts established by examination of the tracks. In the instant case Sheriff Coppock did not make any conclusion or give any opinion. He just stated as a fact that the tire track found a short time after the fire was similar to the tires found on the defendant's pickup. It is our opinion that the trial court did not abuse its discretion in allowing the sheriff to testify concerning the tire track and admitting into evidence the photograph of the track. The weight of said evidence was for the jury to determine. The defendant's third assignment is without merit.

The defendant next contends that the trial court erred in overruling the defendant's demurrer to the evidence made at the end of the state's case because all of the evidence presented to that point raised only a mere suspicion of the defendant's guilt. We disagree. It is obvious that the evidence presented by the state was circumstantial. However, the evidence presented by the state was that the defendant had access to the laundry, a "Rube Goldburg contraption" connected to a timing device and a source of natural gas had been constructed, the defendant's fingerprint was found on some of the cardboard tubing, the defendant had purchased masking tape and wire similar to that used in sealing an air conditioning vent and wiring a battery to the timing device, the defendant had been in the market for a used battery, the defendant had access to a model-T coil and to cardboard boxes similar to those used to construct the cardboard tubing, tire tracks similar to those made by the defendant's truck were found in a lot close to the laundry, a suspicious vehicle had been seen on that lot prior to the fire, and the building had in fact burned.

In *Logan* v. *State*, Okl.Cr., 493 P.2d 842, the following language appears.

> "While much of the evidence is circumstantial, this court has often held a criminal case may be proved cir-

> cumstantially and reasonable inferences drawn therefrom have the same probative effect as direct testimony. *Young* v. *State*, Okl.Cr., 373 P.2d 273. Additionally, circumstantial evidence need not exclude every hypothesis or negate any possibility other than guilt. . ."

It is therefore our opinion that the trial court properly overruled the demurrer as there was sufficient evidence presented by the state to prove a prima facie case of the crime charged.

The defendant's fifth assignment contends that the trial court erred in refusing to reduce the charge to third degree or fourth degree arson because the facts could support a verdict of either. Again we disagree.

The defendant was charged under the provisions of 21 O.S. (1971), §1402 which provides as follows:

> "Any person who willfully and maliciously sets fire to or burns or by the use of any explosive device or substance destroys in whole or in part, or causes to be burned or destroyed, or aids, counsels or procures the burning or destruction of any building or structure, public or private, other than dwelling houses or contents thereof, the property of himself or another, shall be guilty of arson in the second degree, and upon conviction thereof shall be punished by a fine of not to exceed Twenty Thousand Dollars ($20,000.00) or be confined in the penitentiary for not more than fifteen (15) years or both. . ."

Arson in the fourth degree which is defined by §1404 deals primarily with attempted arson. Third degree arson as defined by §1403 concerns the burning of personal property having a value in excess of $20.00 or the willful burning of any building or personal property with intent to injure or defraud an insurer. In the instant case the facts presented fit squarely within the provisions of §1402. The trial court

would have abused its discretion in reducing the charge. Said assignment is without merit.

The defendant's sixth assignment urges that the trial court committed reversible error in refusing to submit to the jury the defendant's requested instructions and to submit to the jury instructions on arson in the third and fourth degree. Again we must disagree.

As stated above the evidence presented at trial fit squarely within the elements of the crime charged, arson in the second degree. The defendant denied having anything to do whatsoever with the intentionally set fire which destroyed the laundry building. An instruction on third and fourth degree arson was not required in the instant case. The defendant was either guilty of arson in the second degree as defined by Section 1402 or he was innocent.

An examination of the record reveals that the instructions submitted by the trial court, when considered as a whole, fairly and correctly stated the law applicable to the issues presented by the evidence. They were therefore sufficient. See *Stone* v. *State*, Okl.Cr. 442 P.2d 519.

The defendant's seventh assignment of error contends that the trial court committed reversible error in failing to permit the defendant to waive his right to have the jury set the punishment, the defendant having specifically requested that the trial court assess punishment.

In our recent case of *Reddell* v. *State*, Okl.Cr., 543 P.2d 574, this Court addressed itself to this issue and specifically held that the statutory intent of 22 O.S. 1971, §926 is to give the jury an opportunity to pass upon the issue of punishment whether or not so requested by the defendant. The defendant may not unilaterally waive the assessment of punishment by a jury which is able to agree.

In *Crawford* v. *Brown*, Okl.Cr., 46 O.B.J. 1124 (June 14, 1975), in a related matter this Court held that a de-

fendant may not unilaterally waive his right to trial by jury and that any waiver must be joined by the prosecuting attorney and the judge of the trial court. The refusal of either to consent will result in trial by jury. We further held that the state in our adversary criminal justice system has a valid and legitimate interest in trying its cases before that body which history shows and the framers of our Constitutions knew produced the fairest end result—the jury. The rationale of Crawford applies also to the instant case. It is therefore our opinion that any waiver by the defendant of the right to have the jury assess punishment upon determination of guilt must be joined by the prosecuting attorney and the judge of the trial court. The refusal of either to consent to assessment of punishment by the trial court will result in a jury verdict assessing punishment, provided the jury can reach such a verdict. The defendant's seventh assignment is without merit.

The defendant next contends that rendition of sentence at the second trial greater than that at the first trial is reversible error since it constitutes a violation of due process of law. In support of his contention the defendant cites *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714.

However, a reading of *Chaffin*, supra, reveals that the United States Supreme Court held that the rendition of a higher sentence by a jury upon retrial does not violate the double jeopardy clause of the United States Constitution nor does such a sentence offend due process so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness. The choice occasioned by the possibility of a harsher sentence does not place an impermissible burden on the right of an accused to appeal or attack collaterally his first conviction. In the instant case, although the jury assessed punishment harsher than that assessed at the first trial there is no evidence of vindictiveness in the record.

As stated by the defendant in his brief the trial judge allowed the defendant latitude in his voir dire of prospective jurors and all parties were admonished from mentioning four subsequent arsons committed in the vicinity. The defendant's eighth assignment is without merit.

Defendant's last assignment of error urges that the trial court erred in failing to direct a verdict of acquittal since the evidence taken as a whole, was insufficient to sustain a conviction. For the reasons set out throughout this opinion the defendant's last contention is without merit. As stated in *Logan*, supra, it is the exclusive province of the jury to weigh the evidence and determine the facts. Where there is competent evidence from which the jury might reasonably conclude the defendant is guilty the case will not be reversed on appeal on a contention that the evidence is insufficient. In the instant case there is competent evidence, although conflicting, from which the jury might reasonably conclude the defendant is guilty.

From examination of the record as a whole it is apparent to this Court that the defendant received a fair and impartial trial before a jury, that no material right of the defendant was prejudiced and the judgment and sentence appealed from should be, and the same is hereby AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT,
ALFALFA COUNTY, OKLAHOMA
HONORABLE JOE A. YOUNG, JUDGE

BRUCE CASE, Appellant, was convicted of the crime of Arson in the Second Degree and punishment was assessed at a term of five (5) years in the custody and control of the Department of Corrections of the State of Oklahoma and he appeals. The conviction appealed from is AFFIRMED.

SYLVIA MARKS-BARNETT
OKLAHOMA CITY, OKLAHOMA

STEPHEN JONES
JONES AND GUNGOLL
ENID, OKLAHOMA

Attorneys for Appellant

LARRY DERRYBERRY,
ATTORNEY GENERAL
ROBERT L. McDONALD,
ASST. ATTY. GEN.,

Attorneys for Appellee

OPINION BY BLISS, J.,

BRETT, P. J., AND
BUSSEY, J., CONCUR.

I, Ross N. Lillard, Jr., Clerk of the Court of Criminal Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Opinion in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 8th day of November, 1976.

.....
Clerk

By Norma Lamirand
Deputy

(Seal)

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
Alfalfa County, Oklahoma
NOV 10 1976
LUCILLE COPPOCK, Court Clerk
By LUCILLE COPPOCK
DEPUTY

BRUCE CASE, Appellant,	)	
-vs-	)	No. F-75-258
THE STATE OF OKLAHOMA, Appellee.	)	

MANDATE

The Court of Criminal Appeals to the Honorable Judge of the District Court in and for the County of Alfalfa, State of Oklahoma, Greeting:

Whereas, the Court of Criminal Appeals of the State of Oklahoma has rendered its decision in the above styled and numbered case conforming to its opinion filed therein on the 12th day of October, 1976, appealed from the District Court of said County in case number CRF-72-11.

AFFIRMED

Now, therefore, you are hereby commanded to cause such affirmance, to show or be spread of record in your court and to issue such process (see 22 O.S. 1971, §§ 978, 979 and 980) and to take such other and further action as may be in accord with right and justice and said opinion. As provided in 22 O.S. 1971, §§ 1066 and 1072, you shall make due and prompt return to this Court showing ultimate disposition of the within case.

Your return shall be made on the reverse side of the attached copy (the blue sheet) of this mandate, showing thereon the information required by sections 1066 and 1072, *supra*.

Witness, the Honorable Tom Brett, Presiding Judge of the Court of Criminal Appeals of the State of Oklahoma, State Capitol Building, Oklahoma City, this 8th day of November, 1976.

Ross N. Lillard Jr.
Clerk

By (s) Norma Lamirand
Deputy

(Seal)

STATE OF OKLAHOMA)
) SS:
ALFALFA COUNTY,)

In the District Court of the Fourth Judicial District of the State of Oklahoma, Sitting in and for Alfalfa County, Oklahoma.

THE STATE OF OKLAHOMA,)
VS) No. CRF-74-11
Bruce Case,)
Defendant.)

JUDGMENT AND SENTENCE ON CONVICTION

Now, on this 22nd day of November, 1974 the same being a juridical day of said court, and the time duly appointed for judgment in the above-entitled cause, and said cause coming on for judgment, and the defendant Bruce Case being personally present in open court, and being duly represented at all appearances before the court by his attorney of record, and having been legally charged with the

offense of Arson Second Degree, and having been duly informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly pleaded not guilty to said offense after having been duly advised of his rights; and having been duly and legally tried and convicted of the crime of Arson Second Degree, and the defendant having been asked by the court whether he has any legal cause to show why judgment and sentence should not be pronounced against him, and he stating no sufficient cause why judgment and sentence should not be pronounced against the defendant, and none appearing to the court, it is the judgment of the court that said defendant is guilty of the crime of Arson Second Degree.

It is Therefore, Ordered, Adjudged and Decreed by the court that the said Bruce Case serve a term of five years under the direction and control of the Department of Corrections of the State of Oklahoma for the crime of Arson Second Degree, and that said defendant pay the costs of this prosecution taxed at $262.00 for which judgment is hereby rendered against the defendant; and thereupon the defendant is by the court notified of his right of appeal. It is further ordered by the court that an appeal bond be fixed in the sum of $5,000.00 and the defendant is remanded to the custody of the Sheriff until said appeal bond is posted.

s/ Joe Young
District Judge

(SEAL)

Attest:

s/ Lucille Coppock
Court Clerk

FILED
NOV 25 1974
ALFALFA COUNTY, OKLAHOMA
LUCILLE COPPOCK, COURT CLERK
s/ Lucille Coppock

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
In Court of Criminal Appeals
State of Oklahoma
NOV 4 - 1976
ROSS N. LILLARD, JR.
CLERK

BRUCE CASE, Appellant,	)	
-vs-	)	No. F-75-258
THE STATE OF OKLAHOMA, Appellee.	)	

ORDER DENYING PETITION FOR REHEARING AND DIRECTING THE ISSUANCE OF MANDATE

NOW, on this 4th day of November, 1976, the Court after having carefully considered the Appellant's Petition for Rehearing and after complete examination of the record in the case, finds that said Petition for Rehearing should be, and the same is hereby, DENIED.

The Court further finds, that Mandate should issue FORTHWITH.

IT IS SO ORDERED.

WITNESS OUR HANDS, and the Seal of this Court, this 4th day of November, 1976.

s/ Tom Brett
TOM BRETT, PRESIDING JUDGE

s/ Hez J. Bussey
HEZ J. BUSSEY, JUDGE

s/ C. F. Bliss, Jr.
C. F. BLISS, JR., JUDGE

ATTEST:

s/ Ross N. Lillard, Jr.
Clerk

I, Ross N. Lillard, Jr., Clerk of the Court of Criminal Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Order in the above matter, as the cause remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 8th day of November, 1976.

Clerk

By Norma Lamirand
Deputy